IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1443 OF 2004

Ajinath Shrikrishna Kolekar. ... Appellant.
Versus.
Subhash Ramling Kore (Ghodegaonkar)... Respondent.

Shri A.A.Kumbhakoni with Shri A.P.Kulkarni for the Appellant.

Shri S.D.Thokade for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 2nd February, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appeal is by the unsuccessful Defendant challenging the decree for possession passed in favour of the Respondent/Plaintiff which is confirmed by the Appellate Court.

2. The learned Counsel appearing for the Appellant submitted that the disputed will on which reliance is placed by the Respondent is not proved. He submitted that the trial Court has not framed issue on execution of the will. He also placed reliance on the compromise recorded in the Civil Misc. Appeal No.197 of 1984 and contended that the predecessor of the Respondent has admitted possession of the Appellant under the agreement for sale dated 14th August 1980 and in view of the said compromise, the Respondent who is claiming to be the

successor of the Appellant in the said Appeal cannot claim possession from the Appellant.

3. In so far as the grievance regarding not framing of issue is concerned, the Appellate Court has found that parties were aware about the dispute regarding the execution and proof of will involved in the suit and therefore, have led evidence on the said aspect. Even submissions were made before the trial Court. In view of this position, there is no prejudice to the Appellant if specific issue was not framed.

4. Even the trial Court has recorded a finding in favour of the Respondent regarding the proof of will. The Appellate Court considered the evidence in detail and has come to the conclusion that the will has been proved. The Respondent has examined the Medical Practitioner who had examined the deceased at the time of execution of the will and an attesting witness has also been examined. The will is duly registered and in fact the original will was produced from the office of the Sub-Registrar. No fault can be found with the finding recorded by the Appellate Court regarding the proof of will.

5. So far as the last submission is concerned, I find that the same is not specifically advanced before the Appellate Court. However, even assuming that the

Appellant was in possession under the agreement for sale, there is no plea raised by the Appellant that he is entitled to protect his possession under section 53A of the Transfer of Property Act 1882. In this view of the matter there is no merit in the Second Appeal,and the same is dismissed with no order as to costs.

6. Certified copy expedited.

Judge.